87-2076

No. 87-2706

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

J & C, INC. and T-K CO.,
A Joint Venture - - - - - - Petitioner

versus

COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC., and
MARK KOEBRICH - - - - - Respondents

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR PETITIONER IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Respondents seek to persuade this Court that:

> . . . the fact that the Joint Venture was not named in the [December 18, 1980] broadcast had absolutely no effect upon the Court's decision to dismiss the libel claim [against them] (Respondent's Brief, p. 5).

In fact, of course, the Kentucky Court of Appeals specifically considered and rejected the notion that the Joint Venture could base a libel claim upon a

broadcast in which it was not specifically named, when it began a lengthy sentence with the clause, "Although it may be argued that the broadcast could be interpreted to infer that the charges were against "the firm" (Joint Venture)" (Petitioner's Appendix, p. 23a). This fact is true even though the remainder of the sentence to which this clause was attached states that since business entities have no right of action for "false light", there was not enough evidence to show actual malice with convincing clarity, and the claim for libel should be dismissed, all of which appears to Petitioner to be beside the point.

In a more lucid moment, the Kentucky Court of Appeals indicated that it clearly believed that the existence of civil and criminal charges against the landowner of the site where the Joint Venture stored its materials, one Oscar Combs, meant that the Petitioner could not maintain a libel claim. The court stated in its opinion that:

> There had in fact been civil and criminal actions filed against the property owner at the Charlestown [sic] site. *Consequently,* it cannot be said that the broadcast was made with the knowledge that the information was false or with reckless disregard of its truth or falsity (Plaintiff's Appendix, p. 23a, emphasis added).

Clearly, the Court equated the broadcast's not naming the Petitioner directly as dispositive of the validity of Petitioner's libel claim. Just as clearly, it created this equation upon the premise that such a failure of direct identification negates any possibility that the

Petitioner could prove Constitutional "actual malice." In other words, the Court of Appeals held that this Court's "actual malice" standards completely defeat any possibility that a defamation plaintiff can prevail if he has to resort to common-law rules of colloquium in a lawsuit against a media defendant.

Not surprisingly, the Respondents failed to confront the Petitioner's argument that such a "rule of law" is outrageous.

However, they did exhibit a sort of "back-up" argument. It is to the effect that the Kentucky Court of Appeals actually considered the possibility that the December 18, 1980 broadcast was, ". . . of and concerning," the Petitioner and in the course of that consideration determined that the Petitioner had failed to prove Constitutional "actual malice" with convincing clarity (Respondent's Brief, pp. 7-8).

This is preposterous.

The Court of Appeals discussed at some length the evidence upon which it held that the Plaintiff H. W. Thompson was entitled to go to a jury upon remand of his libel claim, which was predicated upon the Respondent's January 18, 1981, broadcast (Petitioner's Appendix, pp. 23a-24a). However, it said nothing about the evidence of "actual malice" relating to the December 18, 1980, broadcast, the one at issue in this Petition, except that it opined that the existence of criminal and civil charges against the landowner of the Charlestown site precluded a finding of Constitutional "actual malice".

This, of course, is not the supposedly "non-existent" evidence that the Respondents had in mind.

Fortunately, the Respondents' charade is revealed in their Brief itself. At page 8 of their Brief, the Respondents label the following quotation from the Petition as a "false premise":

> The Plaintiffs [Petitioners here] proved at the trial of this case that Defendant Koebrich knew at the time of these broadcasts [i.e. the two broadcasts of December 18, 1980] that no civil or criminal charges had ever been filed by any agency or authority against any of the Plaintiffs (Petition, pp. 7-8, as quoted in Respondent's Brief, p. 8).

The Respondents later in their Brief cite testimony from Koebrich including the following colloquy:

> Q. Mr. Koebrich, have you seen any documents wherein Mr. Thompson and Mr. Crum or the Joint Venture were charged with civil or criminal counts?
>
> A. No, sir, the charges were never filed (Respondent's Brief, p. 10).

If this evidence of knowledge of falsity by Koebrich is not general enough, we have the fact that elsewhere in his testimony, as we have seen (Petition, pp. 7-8), Koebrich admitted that he knew that no civil or criminal charges were ever filed against the Joint Venture (Transcript of Evidence, 8th day, Vol. I, p. 57) when he created his series of broadcasts about it and the other Plaintiffs below. To say that Koebrich's testimony related only to one of these broadcasts is like

saying that a blast from a birdhunter's shotgun relates to only one of the pellets in the shell. The bird knows better.

Perhaps such "arguments" should be expected from a media defendant. Obviously, the media believe that the whole world should believe in the existence of never-never land just like it does. In this land, of course, the media can never, never do any wrong, since be definition all of its actions are right. Unable to meet Petitioner's arguments, Respondents invite us to their special domain. It is an invitation we should refuse.

Respectfully submitted,

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